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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-763

CARL E. HIGHTOWER,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Summary of Argument	6
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Page

Chapman v. California (1969), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 10

Davis v. State (1941), 218 Ind. 506, 34 N.E. 2d 23 10

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OPINIONS BELOW

The opinion of the Supreme Court of Indiana is correctly set out in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner was denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the overruling by the Trial Court of Petitioner's Motion for Mistrial because of alleged misconduct of the prosecuting attorney in presenting inadmissible evidence that was subsequently stricken from the record on Petitioner's motion.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the constitution of the United States (Articles of Amendment V and XIV, § 1) are correctly set forth on page 2 of the petition.

STATEMENT OF THE CASE

Two affidavits were filed against the Petitioner in the Owen Circuit Court: Count I of the affidavit in Cause No. 8716 charged Petitioner with the statutory rape on January 31, 1970, of Brenda Mae Gentry a girl of the age of eleven years. Count II charged him with assault and battery with intent to gratify sexual desires on January 30, 1970, on Rebecca Lynn Gentry, a girl of the age of fifteen years. The affidavit in Cause No. 8717 charged him with statutory rape on August 1, 1969, of said Rebecca Lynn Gentry.

By agreement of the parties, the two causes were tried together before the same jury. The jury acquitted petitioner in Cause No. 8716 and convicted him in Cause No. 8717.

Rebecca Lynn Gentry testified that: On August 1, 1969, she, her brothers Donnie and Carl, her sisters Janice and Brenda, and the Petitioner went to the Owen County Fair at Spencer, Indiana. After leaving the fair, they went to

the Riverview Cabins to spend the night. Donnie, Janice, and Carl went to one cabin and the Petitioner with Rebecca and Brenda took another. The Petitioner went to bed on a bed in the living room and gave the bedroom to the girls. During the night the Petitioner came into the room pulled Rebecca's pajamas down to her knees and had sexual relations with her over her repeated protests and attempted resistance (Tr. pp. 184-235). No attempt was made to controvert this testimony, but it was corroborated in part by Brenda Mae Gentry (Tr. pp. 235-267).

The evidence concerning the charges in Cause No. 8717 was less clear. Rebecca Gentry testified that the Petitioner took her and her sister Brenda skating on Friday, January 30, 1970, and afterward they went to his cabins. As she stood near the bed in the living room, he pushed her down on the bed and began playing with her. With one hand on her stomach, he pulled her pants down with the other and played with her privates as she struggled in vain. Hearing Brenda coming up the steps, he let her go. Saturday night Brenda was crying and wanted to go home, so she and Petitioner took her home. They then got her sister Janice and returned to the cabins, getting a six-pack of beer on the way. While they were watching television the sheriff came and took their names and addresses. Then Petitioner took her home (Tr. pp. 205-235).

Brenda Mae Gentry testified that, on Saturday, January 31, 1970, she was sitting on the arm of a chair in the living room of the cabin, wearing slacks. Petitioner came over to her, pulled her pants down to her knees, unzipped his pants, thrust "something" from inside his pants into her body between her legs for two or three minutes, and had an emission. She said this had happened four or five times before (Tr. pp. 235-267).

On recall Rebecca Lynn Gentry testified that she was mistaken about their going skating on January 30, 1970, because the rink was not open. She had been reminded by her hister that they had intended to go bowling in Bloomington, but had gone shopping instead (Tr. pp. 289-303).

Mary Neal, mother of the girls, testified that the prosecutor had checked and found the skating rink was not open and had asked the girls if they were sure about going skating. Then Brenda told her they had gone shopping (Tr. pp. 303-319).

Lana Sparks testified that she saw Petitioner put his hands "all over" her sister Janise Fender on August 8, 13, and 15, 1969, and on her sister's bottom. Janise was six years old at the time. Petitioner offered to buy all the girls a new wardrobe if she and her husband would get Becky to sign an agreement not to bring him to court (Tr. pp. 333-348). Janise Fender corroborated these incidents (Tr. pp. 348-357).

Angela Tincher testified she was eight years old and on July 1, 1970, she was at Collet Park. There a man did "some nasty stuff" to her body, holding on to her private parts, and would not let her off his lap. The man was not in the court room (Tr. pp. 365-378).

Janet Tincher testified that she was the mother of Angela Tincher and lived in Terre Haute. On July 2, 1970, she was in the park with two detectives watching Petitioner through a window. He was with some children, including her small son who was sitting next to him (Tr. pp. 378-388).

Ruth Hightower, wife of Petitioner, testified that her husband who was a used car dealer, went to Indianapolis January 30, 1970, to get his dealer's plates. That evening she went to the Women of the Moose Lodge. Afterwards

she passed the Eagles, where she saw his truck parked. He got home about 11:00 or 12:00 o'clock (Tr. pp. 439-447).

James Walton testified that he was not sure where he was on January 30, 1970, but, if it was a Friday night, he would have been at the Eagles Club in Linton playing rum. On several occasions he played with petitioner there. He remembered one occasion when Petitioner came in about 8:00 or 9:00 in the evening and said he had been to Indianapolis to get dealer plates. They played until 11:30 or 12:00, the witness going broke. The next day he went to the Petitioner's place in Linton to sell a car. Petitioner was there around noon (Tr. pp. 447-452).

Jack Messick, Donald Dean Jackson, and Delbert Fawn testified they were members of the Eagles Club in Linton and remembered an evening when Petitioner came in late and said he had just purchased his dealer plates in Indianapolis. Messick did not recall where he was January 30, 1970. Jackson remembered the incident as being in January or early February, 1970. Fawn said it could have been January 30, 1970, or another week in January (Tr. pp. 447-455, 457-460, 462-465).

Harold Starnes testified he was living at his cabin at Riverview Camp August 1, 1971, but didn't remember seeing the Gentry girls there (Tr. pp. 470-474).

Katherine Starnes testified she lived at the Hightower cabins during July and August, 1969, but had no clear recollection of August 1, 1969, as to whether she saw Petitioner on that date (Tr. pp. 474-477).

After the jury had been sworn, the prosecuting attorney moved to amend Count One of the affidavit in Cause No. 8716 by changing the date from January 31, 1970, to January 30, 1970. The court overruled the motion. The prose-

cutor then moved to dismiss the count without prejudice and the Court overruled the motion because jeopardy had attached. In his opening statement, the prosecutor advised the jury of the court's ruling. Petitioner's attorney moved for a mistrial, but the trial court overruled the motion and admonished the jury to disregard the prosecutor's statement. The prosecutor then told the jury he would prove by testimony of the Gentry girls that the sexual acts complained of occurred on several occasions. Petitioner's attorney objected, but the court overruled the objection and advised Petitioner's attorney that he would be entitled to an instruction that the state assumed the burden of proving any statements made in its opening statement (Tr. pp. 173-179).

During the examination of witnesses relative to the events of January 30, 31, 1970, Petitioner objected to a number of the State's questions as leading, calling for hearsay, indefinite as to dates, duplicity, calling for a conclusion, and lacking in evidentiary foundation. The trial court sustained most of Petitioner's objections, struck some offending testimony from the record, and several times admonished the jury to disregard such evidence. Several times Petitioner made motions for mistrial and each time the court overruled the motion (Tr. pp. 196, 197, 201, 216-222, 236, 238, 239, 240, 243, 245, 247, 248, 250, 252, 269, 270, 276, 277, 308, 321, 322, 324, 335-339, 342, 343, 355-357, 361, 362, 372, 373, 378, 379-383, 385, 389, 394, 396, 423, 424, 436-438, 497-499.)

SUMMARY OF ARGUMENT

Petitioner was not denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the overruling by the trial court of

Petitioner's Motions for Mistrial because of alleged misconduct of the Prosecuting Attorney in presenting inadmissible evidence that was subsequently stricken from the record on Petitioner's motion because:

1. The trial court sustained all proper objections made by Petitioner.

2. The jury was admonished to disregard all questions to which objections were sustained and all answers thereto when given.

3. There is a strong presumption that the jury obeyed the admonition of the court to disregard the improper statements, questions, and answers.

4. The alleged misconduct related entirely to the charges of Cause No. 8716 concerning acts alleged to have been committed on January 30, 31, 1970, and was, therefore, rendered harmless by Petitioner's acquittal on those charges.

ARGUMENT

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE OVERRULING BY THE TRIAL COURT OF PETITIONER'S MOTION FOR MISTRIAL BECAUSE OF ALLEGED MISCONDUCT IN PRESENTING INADMISSIBLE EVIDENCE THAT WAS SUBSEQUENTLY STRICKEN FROM THE RECORD ON PETITIONER'S MOTION.

The Fifth and Fourteenth Amendments to the Constitution of the United States are involved in the issues of this cause only on the broad and nebulous theory that any irregularity in a criminal trial prevents the defendant from having a fair trial and, hence, from receiving due process of law.

The crimes with which Petitioner was charged were crimes against children. In one affidavit, he was accused of raping a fifteen-year old girl and, in another, he was charged with raping an eleven-year-old girl and assaulting the same fifteen-year-old girl to gratify sexual desires. In such a trial, the State's key witnesses were children, who were hampered by inexperience, ignorance of terminology, and great embarrassment.

To obtain proper testimony from them and to confine it to the proper field of relevance it was necessary to frame questions with a more specific direction as to subject-matter than is usually necessary with adult witnesses concerning less embarrassing offenses. To many of these questions, Petitioner objected as leading and the Court

scrupulously sustained most of his objections and clearly and emphatically instructed the jury to disregard the questions. When witnesses answered before the objection could be made or volunteered hearsay or other improper testimony, the court struck the objectionable testimony from the record and warned the jury not to consider it.

The trial court did everything possible to afford Petitioner a fair trial short of acceding to his wish to have no trial at all. The court correctly observed that, if a mistrial were granted, the same thing would happen again and again—as often as the case was set for trial.

In addition to its emphatic admonitions to the jury in sustaining Petitioner's objections and motions to strike, the trial court emphasized those admonitions by two instructions to the jury: Instruction No. 26 reads:

> "During the course of the trial, certain objections were made to certain questions propounded to witnesses, which objections were sustained by the court. This was the court's responsibility; and you should not attempt to determine or consider what the answers to any such questions might or might not have been; and you should not be influenced in any way by the questions to which objections were sustained, but you should disregard them entirely."

Instruction No. 27 read:

> "During the course of the trial, the court sustained motions to strike out certain answers and statements made by certain witnesses. This, also, was the court's responsibility, and you should not consider or be influenced in any way by such answers or statements which were so ordered stricken out."

Ordinarily it is presumed that such admonitions and instructions by the court will be obeyed by the jury and the

Indiana Courts have so held. *Davis v. State* (1941), 218 Ind. 506, 34 N.E. 2d 23. In this case, it is even likely that the conduct of the prosecutor redounded to the advantage of Petitioner. The repeated sustaining of objections to questions asked by the prosecutor, accompanied sometimes by warnings of the court to the prosecutor to comply with the rules of evidence and admonitions to the jury to disregard statements or questions by the prosecutor were discrediting to the prosecutor and would have the natural tendency to create a prejudice in Petitioner's favor.

Chapman v. California (1969), 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705, while containing the statement attributed to it by Petitioner, also contains the following:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances must always be deemed harmful. Such a holding as petitioners correctly point out, would require an automatic reversal and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which not not affect the substantial rights of the parties.' 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 87 S. Ct. 827.

An examination of the instances of alleged prosecutorial misconduct complained of by Petitioner discloses that they all relate to evidence concerning Petitioner's alleged acts on January 30 or 31, 1970, as charged in Cause No. 8716 on which charges Petitioner was acquitted, or on other dates not directly involved in either cause. None of them relate to evidence concerning Petitioner's alleged acts on August 1, 1969, as charged in Cause No. 8717, on which charge Petitioner was convicted. The results of the trial show conclusively that the jury heeded and obeyed the trial court's admonitions and instructions to disregard the evidence ruled improper, for they distinguished between the two causes and acquitted Petitioner in the only Cause that could be affected by such evidence. The evidence against Petitioner in Cause No. 8717 was clear, conclusive, and uncontradicted. Petitioner did not even attempt to dispute the allegations of that charge, but confined his defense efforts to fighting the charges in Cause No. 8716. How much more harmless could an error or accumulation of errors be?

CONCLUSION

For the foregoing reasons, it is respectfully submitted this petition for a writ of certiorari should be denied.

Respectfully submitted,

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